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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 474.

CALTEX (PHILIPPINES), INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITIONER'S REPLY BRIEF.

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Introduction.

The petition (page 3) contains a footnote reference to a pending Government motion in the United States Court of Claims to be relieved from the determination of that Court in *Standard-Vacuum Oil Company* v. *United States,* 120 C. Cls. 518, 551-553. There the Court held "that the Depot Commander (Colonel Cook), with full authority to do so, took Standard's petroleum products for the United States on December 8, 1941, not for destruction, but for use, and Standard is clearly entitled to just compensation for its products so taken"* (Pet. App., p. 39). Since the filing of this petition and on January 11, 1955, the aforesaid motion was granted by the Court of Claims which set its former judgment aside and referred the case to a Commissioner "to take proof and report the amount due in accordance with this opinion."

* Material in parentheses added.

Argument.

Respondent, in its brief in opposition to this petition for certiorari, argues that the decision below is correct in that (1) the taking of petitioner's products is not one which is compensable under the Fifth Amendment and (2) under the circumstances of this case, Colonel Cook lacked authority to take petitioner's property.

1. In the petition herein (pp. 12-14) it was shown that the cases relied on by the Court below in holding that there was no compensable taking of petitioner's property are not controlling on the facts here presented. In its brief respondent relies on the same cases. It also cites other cases which likewise are not in point (Br., p. 9). The additional cases* hold only that consequential damage to private property arising out of the valid exercise of a sovereign power is not compensable under the Fifth Amendment. There was nothing consequential about the damage herein; petitioner's damage was immediate and direct damage, intentionally inflicted on petitioner by premeditated Army action. On and after December 8, 1941 the petroleum products here involved were under the exclusive control of the Army (F. 16; Pet. App., p. 30). While under Army control they were destroyed. This is in no sense consequential damage.

The only other case cited by respondent in support of its argument that the taking of petitioner's property is non-compensable is *United States* v. *Caltex (Philippines), Inc.*, 344 U. S. 149 (1952). Respondent argues (Br., p. 16) that this Court there held that the Army's exercise of control over private property prior to destruction does not

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* *L. P. Steuart & Bro., Inc.* v. *Bowles*, 322 U. S. 398; *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, cert. den. 341 U. S. 948; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502 and *Block* v. *Hirsh*, 256 U. S. 135.

constitute a compensable taking. It is clear from this Court's opinion that the period of control which the Court referred to amounted to only a few days. Thus the Court stated: "Accordingly, it is the legal significance of the events that occurred between December 27 and December 31 which concerns us." 344 U. S. 149, 152. The situation in the case at bar is entirely different; here the Army exercised exclusive control over petitioner's property from December 8, 1941 to April 10, 1942, a period of over four months, before it destroyed the property. What this Court held in the earlier *Caltex* case with respect to a taking for the sole purpose of destruction is in no way controlling on the facts here presented.

Respondent's argument that there was no compensable taking is unsound for other reasons. Thus it states that petitioner was not required to account to the Government for products delivered to non-Army users (Br., p. 8), and from this premise argues that the Army's failure to require accounting is inconsistent with a government taking. This argument must fall since the premise is false. The record herein clearly establishes that petitioner was required to give the Army a stock-credit for products which the Army directed to be delivered to certain essential public services (Cook, 127; see also Finding 39 in the *Standard-Vacuum* case, Pet. App., p. 34).

Respondent also argues that if all products in petitioner's Opon terminal were taken by the Army on December 8, 1941 and petitioner no longer had title to the products, there was no need for it to keep records of the products subsequently withdrawn by the Army (Br., p. 8). If the keeping of records is evidence of title, then under respondent's own theory the Army's acts after December 8, 1941 clearly establish that it took title to all the products on that date. After December 8, 1941 the Army kept rec-

ords of both bulk products in the Opon terminal and products withdrawn from it (Cook, 112-113). These records were subsequently destroyed (Cook, 113). Had petitioner failed to keep records, it would have been unable to prove its damages either in this action or in the action which it commenced to recover for the products withdrawn from the terminal by the Army (Petition, para. 7; Answer, para. 6). However, the keeping of such records hardly proves that the products here involved were not taken.

Finally, in support of its argument that the taking of petitioner's products was non-compensable, respondent contends that "there would have been no point in the Army's seizing oil stocks which, owing to the lack of containers to remove them to dispersal points (F. 19, Pet. App. 30), it could not have used" (Br., p. 8). The taking here involved occurred on December 8, 1941. It was not until late in March 1942 that the supply of containers became exhausted (F. 19, Pet. App. 30). There is no evidence that anyone knew on December 8, 1941 how long the supply of containers would last or least of all that anyone knew it would become exhausted the following March. Respondent's argument is based on hindsight and not on events known to exist on December 8, 1941, the date of taking. Whether or not there was a taking must be determined as of that date.

2. It is obvious from its brief that respondent completely misunderstands the third reason urged for granting the writ of certiorari herein. At pages 15-17 of the petition it has been shown that in its recent decisions (including the instant case) the Court of Claims has misconstrued the rule enunciated by this Court in *Mitchell* v. *Harmony*, 54 U. S. 115 (1851) and has eliminated from consideration one of the situations (the necessity for public service) in which an Army officer during wartime can bind

the government to make just compensation for property which he takes to supply his troops. Respondent ignores this contention. Instead it goes even further than the Court of Claims and suggests that without a specific formal delegation of authority, no Army officer can bind the government to pay just compensation for property which he takes to supply his troops in wartime (Br., p. 10). In support of this proposition, respondent cites, among other cases, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). In his concurring opinion in that case, Mr. Justice Douglas carefully noted that "Wartime seizures by the military in connection with military operations (cf. *United States* v. *Russell*, 13 Wall. 623) are also in a different category" from the ordinary case of condemnation of property where Congressional authority for the taking is required (343 U. S. 632). It is this extraordinary case of a wartime seizure that is here involved. The rule to be applied is that announced by this Court in the *Mitchell* case. It is important that this Court grant certiorari and reassert the rule it established in *Mitchell* v. *Harmony*.

Conclusion.

For the reasons set forth in the petition and amplified herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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